In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1148

HATTIE RAY KING and JAMES ALBERT KING,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on January 29, 1964, its opinion being reported at 327 F. 2d 495. A petition for rehearing was denied on March 3, 1964. Mr. Justice Black extended the time within which to file a petition for certiorari to and including April 15, 1964. A typed copy of the petition was served on the United States Attorney

on April 3, 1964, and service was refused by him. The Department of Justice was served with a printed copy on April 14, 1964, but the petition and record were not filed with the Clerk of this Court, as required by Rule 22, until May 22. The petition is therefore out of time under Rule 22-2 of the Rules of this Court.

In any event, the petition raises no issue warranting review by this Court. Petitioner's sole contention is that there was plain error in the trial court's comments on the evidence in its charge to the jury. After reviewing the evidence, the court said (R. 120):

> To summarize what I have said, the Government's case, from these three witnesses, if you believe what they have said, is quite strong. And according to my view, the testimony offered by the defendants is awfully weak. If you believe the testimony of the Witness Mashburn beyond a reasonable doubt, then it is your sworn duty to find these two defendants guilty as charged. On the other hand, if you believe the testimony of the two remaining witnesses whose testimony you are permitted to consider in arriving at your verdict for the defendants, the two defendants themselves, if you believe what they have had to say about it, or if from their testimony there remains a reasonable doubt as I have defined reasonable doubt to you, then you should vote not guilty for your verdict. Let me caution you again, now, you are in no way bound by what comment I have given you on the evidence. I have a right to make that comment under the law of the United States. You are not bound by

> it. You are perfectly free to disregard it entirely when you retire to the jury room to consider your verdict.

Similar admonitions carefully limiting the effect of the court's comment on the evidence were repeatedly made during the course of the charge (R. 112, 118, 119, 122). No exception to the charge was made by either party (R. 123).

The remarks of the court were amply justified by the record. The local area supervisor of the alcohol and tobacco tax division of the Internal Revenue Service testified that about 9:00 p.m. on August 13, 1962, he observed a pickup truck stop on a dead-end road in Tallahatchie County, Mississippi. The only houses on the road were those of petitioner and his father. A man and a woman emerged from the cab of the truck and two children alighted from its back end. The man then unloaded a number of jugs from the truck by passing them to the woman and children, who hid them in bushes by the side of the road (R. 24-27). Then they all returned to the truck, which started down the road. The supervisor, who had observed the truck continuously, then radioed instructions to two investigators to close in on the truck and arrest its occupants. He saw that nobody left or entered the truck in the meantime (R. 27, 29). The two investigators testified that they drove up and found petitioners standing near the truck which was then parked in another field road. Three one-gallon jugs, which were found to contain non-tax-paid whiskey, were directly at their feet and an ad-

ditional seven jugs were found in the bushes nearby (R. 49-50, 65-67). More jugs with similar contents were found in the bushes where the truck had first stopped (R. 49, 68). When he was arrested, petitioner James King asked that his wife be allowed to go home because "she's got nothing to do with this whiskey" (R. 29, 53).

Both petitioners testified in their own behalf. They denied possession of any whiskey and claimed that they had been looking for a bull which had been bought that day and which had broken out of its fenced-in lot (R. 81-86, 99-101). The jury found petitioners guilty on a one-count indictment for possessing non-taxpaid whiskey after deliberating for nine minutes (R. 141). Petitioner James King was sentenced to two years' imprisonment, and petitioner Hattie King was fined $500 and placed on probation for three years (R. 148-151).

In the circumstances shown, the guarded comment by the court was wholly proper. Manifestly, no question of plain error which would warrant reversal under Rule 52(b) of the Federal Rules of Criminal Procedure is presented. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JUNE 1964

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